UNITED MANUFACTURERS SDN. BHD.

v.

SULAIMAN AHMAD & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
GUNN CHIT TUAN J
[CIVIL SUIT NO. C506 OF 1983]
21 JANUARY 1989

HIRE PURCHASE: *Whether notice of intention to repossess under s. 16(1) of the Hire Purchase Act 1967 (Revised 1978) becomes ineffective if there is a delay in repossession - Whether notice under s. 16(3) of the Hire Purchase Act was served - Sections 43, 44 of the Hire Purchase Act - Mere denials - Whether triable issues raised.*

By an agreement dated 15 May 1980 (hereinafter called "the said hire purchase agreement") the plaintiff let to the first defendant on hire purchase a second-hand tractor for the total price of RM228,600 payable by a deposit of RM18,000 and the balance by 36 monthly instalments of RM5,850. The first defendant paid the initial deposit and 3 months instalments but thereafter fell into arrears of hire rentals from September 1980 and has not paid any hire rentals since then. The plaintiff also carried out repairs and supplied spare parts for the said tractor, and the first defendant was indebted to the plaintiff in the sum of RM60,492.80 for the spare parts and repairs rendered.

The plaintiff's sent the notice of intention to repossess on 15 July 1981. The repossession was on 28 September 1983. The first defendant's Counsel contended that the notice of intention to repossess ceased to have effect by the time the repossession took place which was more than 2 years later and therefore there was a triable issue whether in the circumstances there has been compliance with the requirement of the law.

The first defendant's Counsel also averred that no notice was served under s. 16(3) of the Hire Purchase Act and that there was no provision in the said hire purchase agreement which required the first defendant to notify the plaintiff of a change of address.

On 7 August 1985 the plaintiff applied for summary judgment but the application was dismissed by the learned Senior Assistant Registrar on 21 November 1985. The plaintiff appealed on 23 November 1985, and after hearing arguments in chambers on 20 October 1987 the appeal was dismissed and the plaintiff applied for further arguments in open Court.

Held:

[1] The plaintiff can repossess the goods and the relevant notice does not cease to be effective merely because the plaintiff did not actually repossess until 2 years after service of the said notice so long as the arrears of instalment including arrears of interest due on overdue instalments remain payable and unpaid.

[2] There was service of the s. 16(3) notice in accordance with the provisions of s. 43(c) of the Hire Purchase Act. Apart from averments relating to service, the rest of defence consists of admissions or mere denials.

[Appeal allowed.]

Cases referred to:
Beer v. Davies [1958] 2 QB 187
Wallingford v. Mutual Society [1880] 5 AC 685

Legislation referred to:
Hire Purchase Act 1967, ss. 16(1), (3), 43, 44
Road Traffic Act 1930 [UK], Part I, s. 21, (c)

For the plaintiff/appellant - Cheong Wee Wong; M/s. Rashid & Lee
For the 1st defendant/respondent - Mohd Nor bin Mohamad; M/s. Wong Chooi & Mohd Nor

JUDGMENT

Gunn Chit Tuan J:

By an agreement dated 15 May 1980 (hereinafter called "the said hire purchase agreement"), the plaintiff let to the first defendant on hire purchase a second-hand tractor for the total price of RM228,600 payable by a deposit of RM18,000 and the balance by 36 monthly instalments of RM5,850. The first defendant paid the initial deposit and 3 months' instalments but thereafter fell into arrears of hire rentals from September 1980 and has not paid any hire rentals since then. The plaintiff has also carried out repairs and supplied spare parts for the said tractor, and the first defendant was indebted to the plaintiff in the sum of RM60,492.80 for the spare parts and repairs rendered.

On 7 August 1985 the plaintiff applied for summary judgment but the application was dismissed by the learned Senior Assistant Registrar on 21 November 1985. The plaintiff appealed on 23 November 1985, and after hearing arguments in chambers on 20 October 1987 I dismissed the appeal, and the plaintiff applied for further arguments in open Court.

The issues raised by the first defendant which he claimed to be triable issues and which can be gathered from his statement of defence and the affidavit filed in opposition to the plaintiff's application for summary judgment were as follows:

(i) general denial of the sum due and owing;

(ii) notice of intention to repossess under s. 16(1) of the Hire Purchase Act 1967 (revised - 1978) (hereinafter referred to as "the Act") was not served on the first defendant and accordingly the repossession was unlawful and

(iii) notice under s. 16(3) of the Act was not served.

Service of the notice under s. 16(1) of the Act:

Section 16(1) of the Act reads as follows:

> 16. (1) Subject to this section, an owner shall not exercise any power of taking possession of goods comprised in a hire-purchase agreement arising out of any breach of the agreement relating to the payment of instalments unless there had been two successive defaults of payments or a default in respect of the last payment and he has served on the hirer a notice, in writing, in the form set out in the Fourth Schedule and the period fixed by the notice has expired, which shall not be less than twenty-one days after the service of the notice. As regards service of the notice under s. 16(1) of the Act, Counsel for the plaintiff pointed out that the address of the first defendant as stated in the said hire purchase agreement is 46, Kg. Buloh, Kuala Brang, Kuala Trengganu. The said notice was served on the first defendant at the aforesaid address by way of AR Registered post and the same was duly acknowledged as received by him (*vide* Exhibits UM76 and UM77 to encl. 15). The clear acknowledgement of receipt on the AR card by the first defendant showed that the first defendant's defence that he did not receive the notice was untrue.

Encik Mohd Nor, Counsel for the first defendant, pointed out that in the first defendant,s affidavit in reply it was averred that the repossession was unlawful because even if the notice of intention to repossess was served on the first defendant, it has ceased to have effect by the time the repossession took place more than two years later.

The relevant notice of intention to repossess under s. 16(1) of the Act was as follows:

United Manufacturers Sdn. Bhd.
Lot 2 & 4, Jalan l3/2 PO Box 1064,
Petaling Jaya, Selangor, Malaysia.
Tel. No. 775755 (5 lines),
Telex: MA 37599, Cable:
Uniman Petaling Jaya.

Encik Sulaiman bin Ahmad,
46, Kg. Buloh Kuala Brang
Kuala Trengganu,
Trengganu

AR Registered

15 July 1981

Dear Sir

Notice Under Hire Purchase Act 1967 (s. 16)

Notice of Intention to re-possess

Take notice that United Manufacturers Sdn. Bhd. the owner of Used Fiat Allis AD14B/7 E/ No. 008011 C/No. 010727 hired by you under agreement No. UM/PJ-37/80 dated the 15 May 1980 intends to retake possession of the goods after expiration of 21 days from the service of this notice unless the arrears of instalments including arrears of interest due on overdue instalments which now amount to RM73,232.32 are paid to United Manufacturers Sdn. Bhd., Lots 2 & 4 Jalan 13/2 PO Box 1064 Petaling Jaya, Selangor, Malaysia on or before 5 August 1981.

Total amount payable	RM228,600.00	
Amount paid by hirer to 15 July 1981	RM 29,700.00	
Arrears under agreement to 15 July 1981	RM 70,200.00	
Overdue interest @ RM1.28 per day	RM 3,032.32	RM 73,232.32

Note:

This notice is issued without prejudice to any rights already accrued to us under any previous similar notice which may have been served on you.

Yours faithfully,
United Manufacturers Sdn. Bhd.
Sgd. f. Manager.

c.c. Mr. Lee Kee Fong
4-F, Jalan Pulau Kambing,
Kuala Trengganu, Trengganu
Encik Katas Husin **Mr. Wong Sang**.

The repossession was on 28 September 1983 and it was the contention of Encik Mohd Nor that it was not unacceptable for the first defendant to say that he did not receive the notice because he applied his mind to the period immediately before or within a reasonable period before the repossession. Counsel conceded that the notice under s. 16(1) was indeed served on the first defendant but submitted that the notice had ceased to be effective by the time repossession was carried out, and stated that the notice to be given to a hirer under s. 16(1) is a strict requirement of the law and there was therefore a triable issue whether in the circumstances there has been compliance with the requirements of the law.

On this point I was of the view that s. 16(1) of the Act only requires that before repossession, the notice to be served on the hirer must:

(i) be in writing,

(ii) in the form set out in the Fourth Schedule, and

(iii) the period fixed by the notice has expired, which shall not be less 21 days after the service of the notice.

Section 16(1) does not specify any time limit within which an owner must repossess after service of the s. 16(1) notice. In my view, so long as the provisions of s. 16(1) of the Act have been complied with, the owner can repossess the goods and the relevant notice does not cease to be effective merely because the owner did not actually repossess until two years after service of the said notice so long as the arrears of instalments including arrears of interest due on overdue instalments remain payable and unpaid.

Service of notice under s. 16(3) of the Act:

Section 16(3) of the Act is as follows:

> 16. (3) within fourteen days after the owner has taken possession of goods that were comprised in the hire-purchase agreement he shall serve on the hirer and every guarantor of the hirer a notice, in writing, in the form set out in the Fifth Schedule.

Counsel for the plaintiff stated that the relevant notice under s. 16(3) of the Act was dated 8 October 1983 and was addressed to the first defendants at 46, Kg. Buloh, Kuala Brang, Kuala Trengganu which is his address as stated in the said hire purchase agreement. The said notice was sent to him by way of AR Registered post but was returned with the remark "retour". Counsel then referred to para. (1) of the first defendant's statement of defence wherein it was averred that the first defendant admits paras. 1, 2 and 4 of the amended statement of claim and para. 2 of the amended statement of claim is as follows:

> The first defendant has an address at 46, Kampong Buloh, Kuala Brang, Kuala Trengganu, Trengganu.

Reference was also made to the first defendant's affidavit affirmed on 14 October 1985 wherein the defendant has affirmed on oath that his address was 46, Kg. Buloh , Kuala Brang, Kuala Trengganu, Trengganu. Counsel for the plaintiff therefore submitted that at all material times the first defendant was at 46, Kg. Buloh, Kuala Brang, Kuala Trengganu, the address to which the s. 16(3) notice was sent. It was also submitted by him that in any event if the first defendant did change his address, it was incumbent on him to notify the plaintiff of the change of address; but the plaintiff was not notified of any change of address by the first defendant. Counsel also pointed out that apart from a denial by the first defendant that the notice under s. 16(3) was served on him, he did not say what his address was at the time the said notice was issued. It was also contended that if the first defendant failed to notify

the plaintiff of any change of address, he did so at his peril and could not rely on his failure to notify the plaintiff of his change of address and to state that he has not received the s. 16(3) notice. The plaintiff had done all that he could to bring the said notice to the knowledge of the first defendant on 8 October 1983.

Counsel then referred to s. 43 of the Act which is as follows:

> 43. Any notice or document required or authorised to be served on or given or sent to an owner or hirer under this Act may be served or given or sent:
>
> (a) by delivering it to him personally;
>
> (b) by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed there at and apparently of or over the age of sixteen years: or
>
> (c) by posting it by registered post addressed to him at his last known place of abode or business.

and submitted that the duty imposed on the plaintiff as the owner of the tractor was only to post the statutory notice by registered post to the first defendant who was the hirer. He stated that the above quoted section of the act does not prescribe that the owner has to ensure that the hirer received the notice, and submitted that to say otherwise would place an unreasonable burden on the plaintiff if the first defendant attempted to evade service or did not notify the plaintiff of his change of address. Counsel also stated that the hirer could remain at his address but yet refuse to acknowledge the AR card and thereby thwart the owner's attempt to serve the notice on him. He further submitted that if it was the intention of the legislature to ensure that notices are actually received by the hirer then it would have been expressly provided for in the Hire Purchase Act 1976.

Encik Mohd Nor stated that the notice under s. 16(3) of the Act was sent to the plaintiff's address but was returned with the remark "Retour". He stated that the service fell within s. 43 (c) of the Act, and by virtue of the following s. 44 of the Act it was *prime facie* proof of service:

> 44. The affidavit or oral evidence of an owner or his servant or agent as to the delivery, leaving or posting of any notice or document required or authorised to be served, given or sent by this Act is admissible as *prima facie* proof of service, giving or sending of the notice or document.

Counsel contended, however, that since there was *prima facie* proof only as opposed to conclusive evidence the same could be disproved. He also contended that if it was intended by the legislature that proof of due posting is incontrovertible proof of service it would have said so by making it conclusive evidence either in s. 43 or s. 44 of the Act. He further contended that the fact that the notice was returned undelivered to the first defendant was clear and unchallenged evidence which rebutted the *prima facie* proof of service as provided for in s. 44 of the Act. On the question of change of address, Encik Mohd Nor stated that there was no provision in the said hire purchase agreement which required the first defendant to notify the plaintiff of a change of address. He stated that the first defendant was in fact resident at the address in question but somehow the letter was returned and there was no evidence that it was the first defendant himself who returned it and as such the first defendant was not precluded from relying on the fact that the notice was not received by him. He contended that looking at the AR card (Exhibit UM82) the notice was not delivered to the first defendant and before he could return it he would have had to receive it and the AR card would have been acknowledged if that was the case.

Counsel then referred to *Beer v. Davies* [1958] 2 QB 187 in which case an omnibus driver, who was involved in a minor road accident while driving his omnibus, gave his usual home address to the police officer who took particulars of the accident. He was given no warning of any proposed prosecution under Part I of the UK Road Traffic Act 1930, but 10 days after the police, under s. 21(c) of the Act, sent to him by registered post at his usual address a notice of intended prosecution for careless driving. Section 21 of the UK Road Traffic Act 1930 is as follows:

> Where a person is prosecuted for an offence under any of the provisions of this part of this act relating ... to reckless or dangerous driving he shall not be convicted unless either - (a) ... or (b) ... or (c) within ... fourteen days of notice of the intended prosecution specifying the nature of the alleged offence and the time and place where it is alleged to have been committed was served on or sent by registered post to him or the person registered as the owner of the vehicle at the time of the commission of offence.

The defendant did not in fact receive the notice as he had gone away for a week's holiday, and as there was no one at his home to take delivery of registered post the notice was returned by the post office to the police marked accordingly. In a prosecution for careless driving the Magistrate took the view that the terms of s. 21(c) as to the service of the notice had not been complied with, and he accordingly dismissed the information. On appeal by the police it was held that the requirements of s. 21(c) were not sufficiently complied with by the mere sending of the notice by registered post to the defendant's usual address. As the notice had not been delivered to him within the statutory period there had not been good service within the meaning of the section.

With respect, I considered that the provisions of ss. 43 and 44 or our Hire Purchase Act 1967, are different from the provisions of s. 21(c) of the UK Road Traffic Act. In my view s. 44 of our Act is concerned with proof of service of any notice or document required to be served, given or sent by the Act. According to the section the affidavit or oral evidence of an owner or his servant or agent as to the delivery, leaving or posting of any notice or documents is admissible as *prima facie* proof of service, giving or sending of the notice or document. In this case according to an affidavit of one M. Sivalingam affirmed on 30 July 1985 it was averred that the s. 16(3) notice was sent to the first defendant on 11 October 1983, and that was *prima facie* proof of the service or sending of the notice in question. Then it is clearly provided in s. 43 of the Act, which is the section concerned with the service of the notices, that any notice or document required or authorised to be served on or given or sent to a hirer under the Act may be served on or given or sent by delivering it to him personally; by leaving it at his place of abode or business with some other person apparently an inmate thereof or employed thereat and apparently of or over the age of sixteen years; or by posting it by registered post addressed to him at his last known place of abode or business. There was in my judgment service of the s. 16(3) notice in accordance with the provisions of s. 43(c) of our Hire Purchase Act 1967. Even if I was wrong in my view regarding the service of the s. 16(3) notice, it is to be noted that the first defendant knowing very well that the tractor had in fact been repossessed by owner on 28 September 1983, (*vide* receipt marked Exhibit UM78), took no action at all to enforce his rights under the Act to get back the tractor by reinstating the said hire purchase agreement by paying the arrears of instalments, etc.

Denial of Liability:

Plaintiff's Counsel has submitted that a bare denial is insufficient for the first defendant to rely on as constituting a triable issue (see *Wallingford v. Mutual Society* [1880] 5 AC 685 per Lord Blackburn at 704) unless the grounds on which he relies as showing that he is not indebted are stated. He also pointed out that the first defendant's affidavit dated 14 October 1985 in opposition to the application for summary judgment only challenged that part of the plaintiff's claim relating spare parts and services. In so far as the sum of RM201,622.08 due and owing and under the said agreement is concerned, the denial of the first defendant was not substantiated. As regards the plaintiff's claim for RM60,492.80, Counsel conceded that there was no pleading regarding the costs of insurance cover amounting to RM5,741 for which the first defendant has to reimburse the plaintiff, and agreed that the said sum should be deducted from the RM60,492.80. Counsel also conceded that interest for late payment was not provided for in the said agreement. Finally Mr. Cheong pointed out that all the invoices sent to the first defendant were never acknowledged and that such invoices were dated as far back as 1980 and had also never been denied by the first defendant.

Encik Mohd Nor however submitted that the first defendant's denial of indebtedness was not as bare as claimed by plaintiff's Counsel because it was based on the averments regarding non-service of the relevant notices. As regards the claim for spare parts and services rendered, Counsel stated that the exhibits to the plaintiff's affidavits were not records of delivery and repairs but the plaintiff's own invoices and delivery notes which do not show any acknowledgement by the first defendant. He submitted that there were therefore *bona fide* issues to be tried. Looking at the statement of defence, I would agree that apart from the averments relating to the service of the notices, the rest of the defence consists of either admissions or mere denials. Even the first defendant's affidavit in reply dated 14 October 1985 has not condescended upon particulars.

Having heard further arguments in open Court I then considered that there were no triable issues and decided that my decision in chambers dated 20 October 1987 dismissing the plaintiff's appeal from the learned Senior Assistant Registrar ought to be set aside for the reasons stated above. I therefore allowed the appeal and ordered that the plaintiff be at liberty to enter judgment against the first defendant for the sum of RM251,618.46; in respect of RM201,662.08, interest at 8% per annum simple calculated on daily basis from 9 October 1983 to date hereof and interest on the judgment sum at 8% per annum from date hereof to date of payment and costs.

Also found at [1989] 1 CLJ 1005